Supreme Court, U.S.
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No. 04-1246

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In The Supreme Court of the United States

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Petitioners,

v.

FOOD LION, LLC; BOBBY DALTON; MIKE GRAYBEAL;
WINN DIXIE CHARLOTTE, INCORPORATED; SAM'S CLUB,
INCORPORATED; WAL-MART STORES, INCORPORATED;
HARRIS TEETER, INCORPORATED; RANDY RASMUSSEN,

Respondents,

CHARLIE GURISCO; LARRY LOLLIS,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

The South Carolina Unfair Trade Practice Act (SCUTPA) outlaws "unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20.

The questions presented are:

I. Did the federal courts err by ruling that the Petitioners could not state a claim for relief under the South Carolina Unfair Trade Practices Act and dismissing them on Rule 12(b)(6), on the basis of irrelevant, common law contract principles, particularly where the claims are a matter of first impression on South Carolina statutory tort rights?

II. Did the Petitioners fraudulently join individual store managers for Winn-Dixie, Harris-Teeter, and Food Lion grocery stores in order to defeat Federal diversity jurisdiction?

CORPORATE DISCLOSURE

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Maurice Bessinger and Piggie Park Enterprises, Inc. respectfully request that a *writ* of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on November 19, 2004.

OPINIONS BELOW

This petition seeks review of the judgment set forth on the 19th of November, 2004 by the United States Court of Appeals for the Fourth Circuit, located at Appendix pages 9a-11a (115 Fed. Appx. 636, considering CA-03-2828-3-17; CA-03-2874-17-8; CA-03-2807-4-17; CA-03-3153-2-17; CA-03-2810-8-17). The corresponding, unpublished opinion is located in the Appendix at pages 1a-9a. The Order of the Court of Appeals denying the Petition for Rehearing and Rehearing *En Banc* is set forth at Appendix pages 37a-40a. The prior opinion of the United States District Court for the District of South Carolina, entered November 20, 2003, is reported at 305 F. Supp. 2d 574, and is also reprinted in the separate Appendix to this petition at pages 12a-36a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 2004. The jurisdiction of this Court arises from 28 U.S.C. § 1254.

STATUTES INVOLVED

This case involves federal interpretations of the South Carolina Unfair Trade Practices Act (SCUTPA), a state tort statute set forth at S.C. Code Ann. § 39-5-10 (2004) *et seq.* This case primarily concerns the right of action described by S.C. Code Ann. § 39-5-20 (2004).

STATEMENT

Between August 16, 2001 and August 28, 2003, Plaintiffs / Petitioners Maurice Bessinger and Piggie Park Enterprises, Inc. ("Petitioners") filed suit against nine major grocery store chains and certain individual store managers in various South Carolina state Courts of Common Pleas. The Petitioners alleged violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.*

The Petitioner Maurice Bessinger is an officer and principal shareholder in Petitioner Piggie Park Enterprises. The Petitioners operate eleven restaurants in the midlands area of South Carolina, as well as a large bottling and packaging plant that produces barbecue sauce and meat for retail sale in stores. Until September 2000, the Petitioners and Respondents had enjoyed a long-term business relationship. Each of the Respondents had continuously stocked and sold the Petitioners' products for between 10 and 30 years. Since the Petitioners first opened their first restaurant in 1953, the products have become famous and very popular.

In the wake of the Confederate flag controversy in South Carolina, during which the flag was removed from the statehouse, the Petitioners began flying the Confederate flag at each of their barbecue restaurants.[1] The Petitioners were already flying the American flag at their restaurants and continue to do so. In August 2000, various state media began reporting on the Petitioners' political and religious views, with particular emphasis upon the Confederate flag issue. In September 2000, each of the Respondents discontinued the sale of the Petitioners' products because of

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[1]Where the factual allegations in each of the complaints are substantially the same, the plaintiffs will cite to one representative complaint.

the political and religious views allegedly expressed by Mr. Bessinger and reported in the media. The Respondents did this solely in retaliation for Mr. Bessinger's private political and religious views, as reported in the media. The Respondents had never expressed any problem with the high quality of the Petitioners' products, nor any lack of commercial popularity of the products among consumers. The products themselves made no reference, implicit nor explicit, to Mr. Bessinger's political or religious views. No Confederate battle flag ever appeared on the packaging; only a small American flag appeared on the sauce bottles.

The individual store managers for Winn-Dixie, Food Lion, and Harris-Teeter participated in or supervised the extraordinary step of removing from the Respondents' store shelves the products of the Petitioners already stocked. As a result, the Petitioners experienced significant economic damages. They filed a complaint alleging violations of the South Carolina Unfair Trade Practices Act and seek monetary relief.

This appeal involved five of these cases against Defendants / Respondents Winn-Dixie, Inc. (C/A No. 8:03-2874-17), Food Lion, Inc. (C/A No. 3:01-2828-17), Harris-Teeter, Inc. (C/A No. 2:03-3153), Sam's Club, Inc. (C/A. No. 4:03-2807-17), and Wal-Mart Stores, Inc. (C/A No. 8:03-2810-17), and an individual store manager for Winn-Dixie, Inc., Food Lion, Inc., and Harris-Teeter, Inc. These stores and managers (collectively "Respondents") removed their cases to federal court in the District of South Carolina from various South Carolina state courts. The Petitioners moved to remand in the three cases against Winn-Dixie, Food Lion, and Harris-Teeter. Those Respondents alleged fraudulent joinder of the individual store managers, who were South Carolina residents.

The Respondents in all five cases filed motions to dismiss under F.R.C.P. 12(b)(6) for failure to state a claim for which relief could be granted. On October 20, 2003, the District Court for the District of South Carolina, the Honorable Joseph Anderson, Jr. presiding, conducted a consolidated hearing with four of the Respondents present.[2] By consolidated Orders dated November 20, 2003, Judge Anderson denied the Petitioners' three motions to remand, ruling that there was fraudulent joinder of the store managers, and granted the Respondents' motions to dismiss the Petitioners' claims.

On December 12, 2003, the Petitioners filed timely notices of appeal of these final orders to the Fourth Circuit Court of Appeals, entered on December 15, 2003. By opinion dated November 19, 2004, a three-judge panel of the Fourth Circuit Court of Appeals affirmed the district court. On December 14, 2004, the Fourth Circuit denied the Petitioners' Petition for Rehearing and Rehearing *En Banc*.

REASONS FOR GRANTING THE WRIT

Summary

The judgment of the United States Court of Appeals for the Fourth Circuit should be reviewed by this Court first because this case presents a strong case for legal error. This case involves a pre-trial dismissal by a federal court of claims arising under a state tort statute, where no South Carolina court had ever before considered analogous circumstances. Moreover, the court relied upon the common law of contracts to artificially constrain and effectively negate legislatively created tort rights of action. This conflicted with established, liberal interpretations of

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[2]Defendant Harris-Teeter filed identical motions, but the parties were still briefing them at the time of the hearing.

unfair trade practices claims in South Carolina, which had no implicit nor explicit connection to contract law in any prior jurisprudence. Because this case involves federal courts interpreting matters that exclusively involve South Carolina legal issues of first impression and making novel rulings to limit state statutory rights, it merits review by this Court.

In addition, this case merits this Court's attention because the impact of this legal error is significant. In addition to the hundreds of millions of dollars in damages caused by the terminated business relationship at issue, the basic facts involve patent retaliation by the Respondents for the Petitioners' collateral exercise of First Amendment rights of free speech. The South Carolina Unfair Trade Practices Act, as with analogous acts in other states and on the federal level, are interpreted broadly in order to prevent tortious actions in a trade context that cause harm. This was such an action, but left undisturbed, the current holding will effectively allow the indiscriminate termination of profitable and significant business relationships for any kind of insidious motive, regardless of the constitutional freedoms offended. Such a precedent will reach beyond South Carolina and provide flawed authority throughout the nation in the context of analogous trade statutes.

I. The federal courts erred by ruling that the Petitioners could not state a claim for relief under the South Carolina Unfair Trade Practices Act and by dismissing them on Rule 12(b)(6) on the basis of irrelevant, common law contract principles, particularly where the claims are a matter of first impression on South Carolina statutory tort rights.

The South Carolina Unfair Trade Practices Act (SCUTPA) outlaws "unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20. To bring a cause of action under the SCUTPA,

Petitioners had to allege an act in the conduct of trade or commerce that was unfair and that affected the public interest and causes actual damages to the Petitioners. *See* S.C. Code Ann. § 39-5-140; *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105 (S.C. Ct. App. 1989) *aff'd in part, rev'd in part on other grounds*, 309 S.C. 263 (1992). In dismissing the Petitioners' claims, the district court ruled that: 1) the acts alleged were not "unfair," as defined in the SCUTPA, and 2) even if unfair, the acts did not affect the public interest.[3] The Fourth Circuit endorsed these rulings, and they are erroneous. Furthermore, neither the District Court nor the Fourth Circuit examined the propriety of granting a Rule 12(b)(6) dismissal upon dubious legal conclusions on issues of first impression.

A. This case presents novel claims based upon whether South Carolina has authorized a tort remedy for acts in a trade context involving retaliation for the exercise of free speech, and as such are inappropriate for resolution by 12(b)(6) in an area of first impression.

The South Carolina Unfair Trade Practices Act prohibits "unfair" acts, but does not offer a legal definition of "unfair." Furthermore, the law provides that a determination of what is "unfair" is a case-by-case inquiry, based upon the individual facts and circumstances. *Young v. Century Lincoln-Mercury, supra*, 302 S.C. at 326. Published decisions do not reveal a case in which a court has considered whether a defendant's retaliation for a plaintiff's privately expressed, political or religious views by terminating a longstanding business relationship and physically removing the Petitioners' products from public

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[3]There was no material dispute in the proceedings that the plaintiff has sufficiently alleged acts by the defendants in the conduct of trade or commerce that did cause the plaintiffs actual, monetary damages.

view can be an "unfair act" under SCUTPA. Thus, there is no direct precedent determining whether the Petitioners' allegations demonstrate an unfair act. Thus, in attempting to determine the breadth of this concept in circumstances of first impression, federal courts must exercise particular care to stay true to the policy and analyses set forth by the legislature and state courts addressing the SCUTPA in other contexts.

The Petitioners submit that a 12(b)(6) dismissal under such circumstances merits the extraordinary appellate scrutiny of the highest appellate Court, lest federal courts improperly usurp the role of state courts and legislatures in determining the breadth of their own enactments. Indeed, the South Carolina Supreme Court has consistently held that cases of first impression - particularly a question whether a certain claim exists under a statute - should not ordinarily be decided on motion or demurrer but should instead by fully developed and tried on the merits.

In fact, the South Carolina Supreme Court has ruled specifically that a case of first impression reviewing a novel claim under the statute in this case - the SCUPTA - should not be dismissed for this very reason. *See Jackson v. Atlantic Soft Drink Co.*, 286 S.C. 577, 336 S.E.2d 13 (S.C. 1985) (reversing a lower court decision to grant a demurrer in a case of first impression under the SCUTPA, ruling that "important questions of novel impression should not be decided on demurrer"); *Gentry, supra*, 337 S.C. 1, 522 S.E.2d 137 (granting S.C. Rule Civ. Pro. 12(b)(6) on a case involving allegation of unfair act of first impression would be inappropriate); *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 153 S.E.2d 184 (S.C. 1967) (ruling, in "the still developing state of products liability law," that decision of "important questions of novel impression" could have far-reaching effects and should not be decided on demurrer).

In dismissing these claims, which are clearly not based upon any guidance from South Carolina courts or settled principles of tort law, the District Court contravened these principles, and the Fourth Circuit did not mention them further. The Petitioners respectfully propose that the Supreme Court should review these rulings in order to ensure that these courts have reached the right result in taking these extraordinary steps. For the reasons that follow, the Petitioners submit that the District Court and Fourth Circuit Court of Appeals have erred, and that the result of the erroneous rulings works an injustice upon the intentions of the South Carolina legislature and the relevant rulings of its courts.

B. Respondents' termination of a long-term, profitable business relationship with the Petitioners solely in overt retaliation for Petitioners' collateral exercise of free speech can constitute an "unfair act" under the SCUTPA.

The District Court ruled that the Respondents' decision to terminate a profitable business relationship and discontinue sales of Petitioners' products in retaliation for free speech could not be considered an "unfair act" within the meaning of the SCUTPA. App. 7a, 31a-32a. The court premised its entire ruling upon the common law of contract, imposing contract principles upon the SCUTPA as limitations unprecedented in the law of South Carolina or this Circuit. App. 29a-31a. In doing so, the district court mischaracterized the claims against the Respondents as relating to a breach of contract, when a "contract" was neither relevant in the business relationship nor a part of the Petitioners' claims under the SCUTPA. On an appeal subject to a *de novo* standard, the Fourth Circuit affirmed without substantial discussion all aspects of the district court's opinion, affirming "for the reasons given by the district court in its opinion filed in each of the five actions." App. 8a.

The district court's ruling was plainly contrary to the SCUTPA's intention of expanding tort rights and policy of liberal interpretation in favor of those rights. The Fourth Circuit's summary endorsement effectively cements a precedent that it can never be an unfair trade action to terminate an at-will relationship for any reason, even if it is arbitrary, discriminatory, malicious, without any business justification, and substantially injurious both to the other party and to the consumers.

The district court ruled as a matter of law that the corporate decision to discontinue sales of the Petitioners' sauce was not "unfair." The court repeatedly looked solely to the common law of contracts as established by a single case, *McMaster v. Ford Motor Company*, 122 S.C. 244, 115 S.E. 244, 246-7 (S.C. 1921). App. 28a-30a. However, the common law of contracts had little or nothing to do with the concept of an "unfair" act under the SCUPTA, and it was erroneous to import this irrelevant doctrine to a tort statute. Nothing about *McMaster* relates to tort actions based upon unfair trade practices, and nothing in the SCUTPA refers to contractual relationships, rights or obligations. The Petitioners' claims are likewise bereft of any mention of a contractual relationship or contractual duties.

The district court's rationale was premised upon its own determination that the Petitioners' SCUTPA claim could be analogized to a breach of contract claim: "if termination of a business relationship on the facts alleged here offends public policy and constitutes an 'immoral, unethical, oppressive, unscrupulous' act, the SCUTPA would have substantially contravened long-established basic contract principles." App. 28a-29a (citing *McMaster*). It is better, said the court, to preserve the "mutuality that has long defined business agreements." *Id.* In attempting to trump South Carolina's legislatively enacted tort rights with common-law contract principles, the district court has

actually created new law for South Carolina. Moreover, that creation has no logical precedent. Unfortunately, although the Fourth Circuit did not explicitly address this aspect of the district court's holding, it affirmed all aspects of that holding.

The Petitioners agree that *McMaster* remains valid law in South Carolina, but disagree with the application of its principles to the Petitioners' SCUTPA claim, which involves a statutory right of action established over fifty years after the justices wrote the *McMaster* decision. The SCUTPA is not dependent upon nor co-extensive with the common law of contracts; indeed, it "creates a new substantive cause of action by making unlawful conduct which was not actionable under the common law of torts...." *Young v. Century Lincoln-Mercury, Inc., supra*, 302 S.C. at 325 (citing *State ex rel. McLeod v. C & L Corporation, Inc.*, 280 S.C. 519, 313 S.E.2d 334 (S.C. Ct.App.1984)); *see also Reynolds v. Ryland Group, Inc.*, 340 S.C. 331, 336, 531 S.E.2d 917 (S.C. 2000) (in dissent) (noting that the SCUTPA "was intended to give additional protection to victims of unfair trade practices."). In determining what rights it provides, the SCUTPA "should be given a liberal construction." *Young, supra.*

The Petitioners submit that the courts have erred in ruling without relevant, legal support, that the SCUTPA was restricted by a blanket imposition of the mutuality requirements of the common law of contracts. Not only is such a ruling contrary to the policy of interpreting the SCUTPA liberally in *favor* of protection and as an expansion of the common law, but it is also a ruling that will eviscerate the statute's purpose of expanding rights in the trade context. As a matter of plain, statutory interpretation, words such as "immoral, unethical, oppressive, or unscrupulous" do not depend upon mutuality, in many

ways is an irrelevant concept to SCUTPA's goal of achieving fairness in business dealings.

However, in so far as the parties enjoyed an at-will relationship, the district court overstates the sanctity of the Respondents' freedom to terminate an at-will arrangement under South Carolina law. The Fourth Circuit has itself recognized that in South Carolina, termination of at-will relationships is not the absolute, unfettered privilege that the district court described, and the panel accepted:

> Although some states may give full effect to broad unilateral powers of termination, South Carolina, whose law governs here, does not. It is settled law in that state that regardless of broad unilateral termination powers, the party who terminates a contract commits an actionable wrong if the manner of termination is contrary to equity and good conscience. That standard of conduct is far more stringent than one forbidding only actual fraud, and it may apply to an unconscionable reason for termination as well as to the causing of needless injury in the course of termination.

deTreville v. Outboard Marine Corp., 439 F.2d 1099, 1100 (4th Cir. 1971) (citing *Philadelphia Storage Battery Co. v. Mutual Tire Stores*, 161 S.C. 487, 159 S.E. 825 (1931); *Gaines W. Harrison & Sons v. J.I. Case Co.*, 180 F. Supp. 243) (E.D.S.C. 1960)). Contrary to the two opinions now under review, even the common law provides relevant limitations upon the Respondents' "freedom not to sell [the plaintiffs'] products." App. 30a.

The errors of the district court and Fourth Circuit become more patent when one examines the common law of

tort, which is clearly more analogous for interpreting a tort statute than the common law of contract. The district court cites but dismisses out of hand relevant, published holdings of the Fourth Circuit demonstrating that the facts supporting an analogous, tort claim for the wrongful termination of a distributorship could potentially sustain a claim for an unfair trade act under the SCUPTA. *See* App. 31a (citing *Chuck's Feed &Seed Company v. Ralston Purina Company, supra*, 810 F.2d at 1292). Yet this line of cases is the best authority on the issue of whether the Petitioners' alleged facts demonstrate "unfair" acts. In past decisions, the Fourth Circuit draws the analogy between the "wrongful" element of wrongful termination and the "unfair" element of SCUTPA in analogous business contexts. More importantly, past Fourth Circuit decisions clearly articulate rules limiting the termination of business relationships but both courts have refused to apply those principles to the current Respondents.

The Fourth Circuit considered the commonality between wrongful termination of a distributorship and a SCUTPA claim in *Richland Wholesale Liquors v. Glenmore Distilleries Company*, 818 F.2d 312 (4th Cir. 1987). There, the court held that there was no cause of action for the termination of a distributorship under SCUTPA because the termination was not "wrongful" under the common law, substantively analogous to the "unfair" element of SCUTPA. Id. at 317. In its opinion, the district court briefly noted this holding, but did not address the analogous common-law element of "wrongful." Yet the Fourth Circuit recognized that under South Carolina law, a termination of a distribution relationship can be "wrongful" if the manner of termination is "contrary to equity and good conscience." *Id.* at 315 (citation omitted). Logically, this is a standard that the district court should examine in order to determine whether the Petitioners' allegations demonstrate "unfair" acts.

In an action for the wrongful termination of an at-will distributorship, "behavior that is arguably arbitrary or malicious would present a question for the jury." *Richland, supra* at 316. Stated another way, the defendant is potentially liable if he acted "maliciously and without reasonable business justification in ending the relationship." *Id.* at 316. In determining that the supplier in *Richland* had not acted arbitrarily and had legitimate business justifications for terminating its relationship with the plaintiffs, the Court noted evidence of decreasing sales as well as better business opportunities for the defendant with another distributor. *Id.* at 316-7. This makes sense; the defendant should be protected for reasonable business decisions.

Richland drew heavily from the Court's prior decision in *Glaesner v. Beck/Arnley Corp.*, 790 F.2d 384 (4th Cir. 1986), another case involving a SCUPTA claim premised upon facts of wrongful termination of a distribution arrangement. *Glaesner* also ruled that the defendant had offered legitimate business reasons for terminating the supply relationship. In reaching this conclusion, the Court focused exclusively upon the supplier-distributor relationship and its central priorities of *profitability*. *Id.* at 387. Accordingly, the Court recognized that there were reasons why such relationships failed: changing economic conditions or market trends; poor product quality or supplier support; inadequate investment or experience on the part of the distributor himself. *Id.* at 387. Thus, the court stated the policy that "[a] supplier cannot remain in business if it is forbidden to terminate *unprofitable* distributors." *Id.* (emphasis added).

The parties to such a product distribution arrangement do have certain "freedoms" to terminate. But contrary to the spirit of the district court's opinion here, the Fourth Circuit recognizes that this freedom is *not* unlimited.

Glaesner, supra, at 388 ("....restrictions on terminations have been legislated in order to protect those distributors with comparatively little bargaining power").[4] The *Glaesner* Court found the defendant had terminated the relationship for *legitimate business reasons*, including the plaintiff's failure to promote the product, low sales, lack of management, and failure to meet the defendant's reasonable, business-related demands. 790 F.2d at 386-7. Furthermore, the Court noted that the defendant had not acted arbitrarily, in fact giving the plaintiff ninety days to find a new supplier even though the parties had no agreement to that effect. *Id.* at 389. In short, there was "no circumstantial evidence of the sort that would permit the jury to infer wrongdoing." *Id.*

Unlike *Glaesner* and *Richland*, the case at bar clearly asserts direct allegations and reasonable inferences of arbitrary behavior by the Respondents that violates equity and good conscience, with no legitimate business justification. The district court did not address this, but the complaint clearly sets forth the allegations that the sole motivation and manner of the Respondents' termination of the Petitioners' supply arrangement was retaliation for the Petitioners' private viewpoints. In this case and especially at this dismissal stage, there is *no* evidence that any of the Respondents acted with some concern towards profits, a lack of product quality, problems with the Petitioners' supply system or any other "easily comprehensible business reasons for terminating" the relationship, *see Glaesner, supra*

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[4]South Carolina has provided for specific statutory protections for certain industries, such as protecting "beer distributors from arbitrary, unfair terminations of their distributorship contracts by registered beer producers," *Piedmont Distributing Co., Inc. v. Pearl Brewing Co.*, 737 F.2d 1311, 1314 (4th Cir. 1984) (citing S.C. Code Ann. § 61-9-1010(1)); *see also* S.C. Code Ann. §§ 56-15-10 to 56-15-130 (regulating motor vehicle dealerships). It is easy to envision the SCUTPA as providing a source of analogous, general protection for the plaintiffs here, as the public policies are the same.

at 389, let alone evidence that they had actually experienced any losses, disappointing quality, or other problems with the product or supply method. Rather, the undisputed evidence demonstrates that each of the Respondents had been profiting from their relationship with the Petitioners for one to three *decades*.

These circumstances make this case more like *de Treville v. Outboard Marine Corp., supra,* 439 F.2d 1099. There, the Court overruled a summary judgment for the defendant on the plaintiff's wrongful termination claim. The plaintiff alleged that he had been a franchised dealer for the defendant for nine years, with annual dealership contract renewals, had invested heavily in the defendant's equipment, replacement and repair parts, had faithfully performed his obligations, and had built up a substantial clientele. *Id.* at 1100. The defendant suddenly terminated the plaintiff "arbitrarily and without cause." *Id.* Despite the fact that the complaint lacked specificity as to the wrongful conduct, the Court held that the plaintiff should amend for such facts and survive summary judgment. *Id.*

Likewise, South Carolina state law also validates wrongful termination claims in termination at-will situations where the defendant's action is against equity and good conscience. *See Philadelphia Storage Battery Co. v. Mutual Tire Stores,* 161 S.C. 487, 159 S.E. 825 (1931) (holding that a "jobber" terminated at the peak of the radio selling season, without notice, had a cause of action for wrongful termination against the seller, where seller's behavior was egregious, as the parties had previously had a contract, and on its termination had made a similar agreement, the jobber had spent a great deal of money on advertising, hired a number of agents and bought heavily from the defendant; and alleged that the defendant had terminated him at the height of the selling season in order to replace him with another jobber); *Gaines W. Harrison & Sons, Inc. v. J.I. Case*

Co., Inc. supra, 180 F. Supp. 243 (plaintiff had claim where plaintiff had been a dealer for Case tractors for many years; Case told plaintiff it could not continue to be a dealer unless it agreed to 1) buy a new kind of tractor, 2) not handle any competitive lines, and 3) accept a lower discount rate).

This is precisely the case here, where the circumstances alleged clearly satisfy the "wrongful" element established for the common law claim. By this Court's rulings, it is reasonable that the "unfair" requirement the Petitioners face for their SCUTPA claim is analogous to the "wrongful" element. Viewed in this light, the most relevant authority of this Circuit supports reversal of the district court's dismissal. Yet the Petitioners in this case, suing under a more liberally interpreted tort statute, did not even get the leeway extended to the more restricted common law.

While the district court implicitly recognized that the "wrongful" element in the common law was analogous to the "unfair" element of SCUTPA, see Order at 14, it disregarded *Richland Wholesale Liquors* by assuming without discussion that the Respondents' actions in this case were not "wrongful." At this early stage of the litigation, it is simply inappropriate to rule as a matter of law that the Petitioners do not survive dismissal on the facts alleged, arguably more arbitrary and inequitable than any of those alleged in the successful wrongful termination cases cited *supra.*

Nor is there merit to the court's reasoning that if the Respondent's decision to discontinue selling the Petitioners' products were ruled "unfair," it would be akin to using the SCUTPA to "force the defendants to continue in a business relationship, removing from them the freedom to terminate it." App. 29a. However, this is *not* the logical outcome of the Petitioners' position, nor was it the proper inference for the court to make in a 12(b)(6) inquiry.

Indeed, the Petitioners agree that the law should respect the Respondents' foundational freedom to terminate a relationship with the Petitioners for legitimate commercial reasons. It has been the plaintiffs' consistent position that, in the event that the plaintiffs' *product* was inferior, offensive, or otherwise unprofitable, nothing should interfere with the Respondents' ability to cease such orders. If the SCUTPA was intended to broaden the remedies of common law torts, and the facts of this case would likely justify a wrongful termination claim, they should certainly be considered "unfair" under that statute.

In this case, the facts as alleged demonstrate that the Respondents suddenly abandoned a long-term, profitable relationship, without notice or warning, causing millions of dollars in damages. As the district court acknowledged, the Respondents acted solely in retaliation for Mr. Bessinger's free speech, expressed in a collateral venue having nothing to do with the Respondents' stores or the sauces they carried. The Respondents then punctuated this retaliation by removing the products from the shelves, so that no one could purchase them from their stores. Thus, the Respondents' decisions were effectively arbitrary, in bad faith and unrelated to the product itself. This case is *not* about the freedom not to initiate or terminate a contractual relationship, as the district court stated and the Fourth Circuit ratified, nor does it threaten to limit the Respondents' general freedom not to contract.

The district court's reliance upon such inapplicable principles is further undermined by its reliance upon inapplicable citations. The court looked to *dicta* from two cases in order to justify its novel bridge of a freedom not to contract or associate with limitations in the SCUTPA. *Meyer v. Nebraska* is a long-established case of this Court that involved education rights under the 14th Amendment, and having *nothing at all* to do with the freedom to unfairly

cancel business relationships and stigmatize a product. *See* App. 30a (citing *Meyer*, 292 U.S. 390, 392 [*sic*, actually 262 U.S. 390] (1923)). After the excerpt noted by the district court, the *Meyer* Court continued, "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is *arbitrary or without reasonable relation to some purpose within the competency of the state to effect.*" *Meyer*, 262 U.S. at 399-400 (emphasis added). Employing the SCUTPA in the current context would not violate this maxim.

Even if it did "interfere" with the "freedom to contract," the SCUTPA is not "arbitrary or without reasonable relation to some purpose" that South Carolina may choose to effect. Like the unfair trade protections of the FTCA and numerous other states, the SCUTPA has survived numerous constitutional challenges. *See Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 243, 363 S.E.2d 691, 693 (S.C. 1988) (S.C. Code Ann. § 39-5-20, prohibiting unfair or deceptive acts or practices in conduct of trade or commerce is not unconstitutionally vague, just as FTCA has been upheld on similar challenges). It is no different from hundreds of other statutory enactments that may incidentally place certain guidelines or standards upon the way businesses contract with each other. These courts certainly would not dismiss properly alleged rights of action under federal antitrust statutes, environmental laws, or foreign trade simply because they limit what an American business can contractually choose to do or not to do. Yet they have effectively ruled in this case that the SCUTPA can not affect how businesses make those same contractual decisions.

Nor is there any value in the district court's citation of *Integrated Consulting Services, Inc.*, 176 F.3d 475 at *9 (4th

Cir. 1999) (unpublished).[5] See Order at 13. In this unpublished case, the Fourth Circuit ruled only that a contract had never been formed between two businesses. The facts demonstrated that "LDDS considered a business proposition brought to it by Integrated, which LDDS, in the end, decided not to pursue." *Integrated Consulting, supra.* A ruling that the SCUTPA prevented the acts of the Respondents in this case would not violate the principle to which *Integrated* alludes; logically, there is nothing unfair about deciding not to pursue a contract opportunity, for any reason, as such circumstances would suggest no harm has been done and no justification of fairness should be required.

Notwithstanding the district court's novel position that common law principles of contract liberties should likewise limit the SCUTPA, and the Fourth Circuit's lack of concern with this juxtaposition of doctrines, the South Carolina legislature did not draft the statute with such a limitation and it is not the place of federal courts to misconstrue state common law in order to create rules limiting a state statute of liberal protection. Moreover, if this Court rules that the SCUTPA makes the Respondents' acts unlawful, they do not forfeit their freedom not to associate or to not contract with the plaintiff. They simply have to observe certain rules of fair dealing.

At most, a ruling for the Petitioners would require that in terminating longstanding, profitable business relationships, businesses should have legitimate commercial justifications as to why their decisions to remove such

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[5]The plaintiffs do not believe that this case establishes "the law of the case,' nor that it "has precedential value in relation to a material issue in a case..." as U.S. Ct. of App. 4th Cir. Rule 36(c) would require for citation. The plaintiffs repeat the citation solely in order to demonstrate its inefficacy for the district court's decision, and do not attach it to this Brief as authority.

products from the marketplace are fair, i.e. not "immoral, unethical, oppressive, or unscrupulous," or the cause of "substantial injury to consumers (or competitors or other businessmen)." *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 fn.5 (1972). Such protection is not fanciful or untested; it is already provided in analogous circumstances by wrongful termination at common law, as well as for specific classes of suppliers and distributors under other South Carolina statutes. The policies underlying those protections apply with equal force in the case of Maurice Bessinger and Piggie Park Enterprises, and the SCUTPA is a legitimate source for those protections.

In contradistinction to the district court's analysis and the Fourth Circuit' endorsement, it is important to point out what precedent the current decisions set. By elevating the freedom to terminate a longstanding business relationship to an inviolable, supreme right, the court has effectively ruled that a corporation can terminate for *any* reason and in any manner, whether arbitrary, discriminatory, or malicious, and not be tortious. Thus, the courts have effectively limited the SCUTPA in unprecedented ways. Furthermore, the court has given businesses the unfettered right to instantly destroy all existing at-will relationships without regard for either business justification or the damage caused to the supplier. It is now perfectly legal to cease business relationships solely because the other party is black, female, handicapped, Muslim, and so on.

In summary, neither the alarmist generalizations of the district court nor its reliance upon the common law of contracts justifies its ruling as a matter of law that the acts were not "unfair" under the SCUTPA. In this case, the allegations demonstrate an arbitrary decision in bad conscience and retaliatory motives resulting in a devastating injury to the Petitioners, as well as to the thousands of

consumers that had relied upon the Respondents as their only source of the Petitioners' products for decades. At a minimum, the Petitioners have alleged "unfair" acts sufficient to state a claim under the SCUTPA.

C. The Respondents' unfair acts adversely affected the public interest, as contemplated by the SCUTPA.

The Petitioners have also alleged facts adequate to demonstrate that the Respondents' decisions had an adverse impact upon the public interest. In *Daisy Outdoor Advertising Company, Inc. v. Abbott*, the South Carolina Supreme Court set forth what the Petitioner had to allege in order to meet this requirement:

> Borrowing from a standard fashioned by the Washington Supreme Court, the court in *Noack Enterprises* found that proof of the potential for repetition of a defendant's actions satisfies the public interest requirement of UTPA. In other words, after alleging and proving facts demonstrating the potential for repetition of the defendant's actions, the plaintiff has proven an adverse effect on the public interest. The plaintiff need not allege or prove anything *further* in relation to the public interest requirement.

Daisy, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (S.C. 1996) (emphasis in original) (citing *Noack Enters., Inc. v. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (S.C. Ct. App.1986)). Importantly, the Court stressed that the plaintiffs need only allege facts demonstrating the *potential* for repetition; actual repetition is not required. Id. (noting that, in *Noack*, "Importantly, the Court did not find that the defendant's breach of its warranty to the plaintiff affected

the public interest in any way other than its potential for repetition.").

Furthermore, the Petitioners do *not* have to establish at least two separate acts by the Respondents, i.e. one against the Petitioners and one against a third party; proof of such an act against solely the Petitioners is sufficient. *See Daisy*, 322 S.C. at 495, S.E.2d at 50-1 (noting that contrary holding would contradict the ruling that only "potential for repetition" is required, and "we have never required proof of torts against third parties (in addition to proof of a tort against the plaintiff) as an element of a cause of action under UTPA....").

In prior cases, plaintiffs have demonstrated the potential for repetition primarily in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts. *Daisy*, 322 S.C. at 496, 473 S.E.2d at 56; *see also Dowd v. Imperial Chrysler-Plymouth, Inc.*, 298 S.C. 439, 381 S.E.2d 212 (S.C. Ct. App.1989) (potential for repetition because car salesman was trained to deceive customers by telling them all cars were part of a fleet of cars); *Barnes v. Jones Chevrolet Co.*, 292 S.C. 607, 358 S.E.2d 156 (S.C. Ct. App.1987) (potential for repetition established by evidence of two other instances of bill padding by car dealer). However, the court emphasized that these were not the only ways; rather, "each case must be evaluated on its own merits," and there could be other ways that a plaintiff could demonstrate such potential. *Id.*; *accord Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (S.C. 1998).

In *York v. Conway Ford, Inc.*, 325 S.C. 170, 480 S.E.2d 726 (S.C. 1997), the Court did find potential for repetition through another means. The Court reasoned that the

potential for repetition existed simply due to the nature of the defendant's business, and did not require proof either that it was the defendant's procedure to repeat the act nor that there had been such repetition. *Id.* The SCUTPA claim in *York* involved an allegation that the car dealer had told the plaintiff that the truck he purchased was "a 'like new' demonstrator and had never been titled to an individual" even though it actually had a bent frame from a previous accident and sold two weeks earlier. 325 S.C. at 172, 480 S.E.2d at 727. The Court reversed the Court of Appeals' ruling that he had not established an effect on the public interest:

> Unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition. We hold the trial judge erred in dismissing appellant's UTPA cause of action. Conway Ford is in the business of selling cars. **Certainly the alleged acts or practices have the potential for repetition.**

York, 325 S.C. at 173, 480 S.E.2d at 728 (emphasis added). This was the entire analysis.

In *Crary v. Djebelli*, South Carolina's Supreme Court reiterated this type of common-sense, simple analysis. 329 S.C. 385, 496 S.E.2d 21. *Crary* reversed a Court of Appeals ruling that the plaintiff had to demonstrate at least two separate torts. Citing *York* and *Daisy, supra*, the Court articulated the ruling that "alleged acts or practices have the potential for repetition where defendant remains in the same business and faced with opportunities to repeat the conduct." *Crary, supra*, 329 S.C. at 388-9, 496 S.E.2d at 23.

This is all that the courts of South Carolina require to establish that an act has an impact upon the public interest. The Petitioners have clearly met this burden, as it is beyond

dispute that the Respondents remain in the same grocery business and have the obvious opportunities to repeat the same conduct of terminating business relationships and removing the stock of any supplier in retaliation for his private, political or religious views. This alone is enough, but the district court and the Fourth Circuit have not properly credited these state opinions.

In addition, the Petitioners have alleged that the Respondents did in fact each repeat the unfair acts, in each of their stores, as to every single product of the Petitioners, until they were fully removed. In *Global Protection Corporation v. Halbersberg*, the court illustrated that this was also sufficient allegation of the potential for repetition. 332 S.C. 149, 503 S.E.2d 483 (S.C. Ct. App. 1998). There, the act alleged was the deceptive wrapping of a condom, and the court held that evidence that the defendant sold approximately 48,000 condoms, "each of which was deceptive," satisfied the public interest requirement. As in *Global Protection Corporation*, the removal of each product implicitly affected another consumer of those products.[6] The Respondents each removed many thousands of the Petitioners' bottles of barbecue sauce from their stores, each of which was an unfair act. It is also a reasonable inference that because these actions deprived the Petitioners' of significant revenue, they had an impact upon employees of the Petitioner and the local economy generally.

The public interest requirement is clearly satisfied in this case, and the district court erred in ruling that "the only harm suffered from the alleged unfair act was purely

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[6]The court cited *York* and *Global Protection Corporation* for general propositions, but did not discuss their holdings or relevance as to the means for establishing potential for repetition. In fact, the court did not discuss any of the cases defining the means for determining potential or set forth those rules.

private." App. 35a. The court again wholly failed to consider the other "act" alleged by the Petitioner of removing the products from the shelves, looking only to the corporate decision not to order in the future. Yet this act was an obvious basis for an impact upon the public interest.

Furthermore, the district court also made unilateral conclusions of fact *adverse* to the plaintiff to justify its dismissal ruling, despite not possessing any evidence upon which to base such a decision at the premature phase of dismissal other than the Petitioners' allegations. First, the court made factual findings that the free market system would effectively deter repetition of the Respondents' actions in the future, as the "customers can express their disapproval of a store's decision not to sell a product by shopping elsewhere." App. 34a; *accord* App. 7a.[7] Of course, the market did not prevent the Respondents from taking these actions as to the Petitioners' products, despite the fact that the only evidence before the court was that the Petitioners' products were quite popular. However, the courts have not attempted to resolve the inconsistency in the district court's logic, nor justify its judicial notice of market forces as a deterrent to repetition of these widespread, arbitrary actions that clearly occurred in knowing disregard of a loss of future profits to the Respondents themselves. In its terse opinion, the appellate panel specifically credited this aspect of the district court's holding, which had literally no foundation in legal precedent and was solely the court's own observation of market economics as a guiding legal principle.

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[7]Note that in this case that all of the major grocery chains in the state of South Carolina removed the Petitioners' products almost simultaneously. As a result, the customers did *not* have a choice of another store to get the product, and the court's personal free market theory would not apply.

Second, the district court and the panel have implicitly ruled that the Respondents' decision to cease distributing the Petitioners' products was a "reasonable business judgment." *See* App. 34a-35a (citing *Glaesner, supra* for proposition that South Carolina does not equate "reasonable business judgment with an act of tortious bad faith", and noting that the store is "free not to do business with the store based on those views."). Neither of these factual findings, which clearly drive the court's determination that the Respondents' actions did not affect the public interest, are material under the law nor justifiable upon the pleadings to which the court's inquiry is supposedly limited. Nor is it even appropriate for the court to make factual findings at the dismissal stage. Removing these premises from the court's opinion, absolutely nothing remains to justify the court's decision that the Respondents' actions did not affect the public interest.

In summary, the district court erred both in ruling that the Petitioners' acts were not "unfair", and further that they had no impact upon the public interest, as required to state a claim under the SCUTPA. The Fourth Circuit erred by rubber-stamping this ruling and by failing to give *de novo* attention to the errors raised by the plaintiff. Taken as true with inferences in favor of the Petitioners, the facts as alleged demonstrate that the Petitioner has sufficiently alleged both elements of a SCUTPA claim. The courts' contrary conclusions are prejudicial error and warrant reversal.

II. The Petitioners did not fraudulently join individual store managers for Winn-Dixie, Harris-Teeter, and Food Lion grocery stores.

After removal by the Respondents to federal court and the Petitioners' motions to remand three of them, three individual Respondents remained as co-defendants, who citizenship had an impact upon the court's diversity

jurisdiction.[8] In order to establish complete diversity to preserve their removal of these cases to the district court, the Respondents argued fraudulent joinder by the Petitioners of the individual store managers. The district court agreed, ruling that "the plaintiffs have not even the slightest possibility of recovery against the co-defendant store managers for SCUTPA violations." App. 24a. The Fourth Circuit accepted the district court's rulings without discussion. App. 6a. The Petitioners respectfully argue that these rulings were in error, as they both ignored the plain facts alleged in the complaint on a 12(b)(6) inquiry.

The "fraudulent joinder doctrine" is a judicially-created exception to the complete diversity rule. *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). The doctrine allows a district court to "disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction." *Id.*

In the Fourth Circuit, the removing party has a "heavy burden" in showing fraudulent joinder; all issues of law and fact must be resolved in the plaintiffs' favor and the plaintiffs will prevail even where "only the possibility of a right to relief is asserted." *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232-3 (4th Cir. 1993). To be successful, the moving party must show "either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts." Id. at 232 (quoting *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981) (emphasis in original)). Since outright fraud was not alleged by any of the Respondents, the only basis upon which the removal could be sustained in this case is that the Petitioners had *no possibility* of recovery

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[8] These were Mike Graybeal of Winn-Dixie, Bobby Dalton of Food Lion, and Randy Rasmussen of Harris-Teeter. App. 239.

against the store managers for alleged SCUTPA violations on the basis of the facts, taken as alleged. *See* App. 19a. A claim need not ultimately succeed to defeat removal. *Marshall, supra,* 6 F.3d at 233. It is enough that the plain language of a statute suggests a right of action against the individual. *Id.*

The SCUTPA clearly provides a right of action against an individual "person" who commits an unfair act. S.C. Code Ann § 39-5-140(a); S.C. Code Ann. § 39-5-10(a). To maintain an action against that person, the Petitioners would have to prove 1) the defendant engaged in an unlawful trade practice; 2) the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice; and 3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. *Havird Oil Co. v. Marathon Oil Co.,* 149 F.3d 283, 291 (4th Cir. 1998). As set forth above, the Petitioners have sufficiently alleged an unlawful practice, i.e. an unfair act, that had an adverse impact upon the public interest. *See* Part I of this Brief, *supra.* The sole issue remaining – and the focus of the district court's ruling – is whether the individual Respondents engaged in this unlawful practice in such a way that individual liability is possible.

The district court noted that there was no South Carolina case addressing whether a grocery store manager could be held liable for the unfair trade practices of his employing corporation. App. 21a. The district court chose to resolve this vacancy in the law by applying the standards that South Carolina has established for "control persons" in corporations generally. *See* App. 229 (citing *Plowman v. Bagnal,* 450 S.E.2d 36, 37 (S.C. 1994)). However, South Carolina's rulings as to "control persons" are restricted to "directors and officers" of the corporation, and there is no mention of low-level employees such as a local store

manager. *Plowman,* 450 S.E.2d at 37. Under those principles, "directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA." *Id.*

A store manager is not in fact a corporate officer. Black's Law Dictionary's defines "corporate officers" as "[t]hose persons who fill the offices which are provided for in the corporate charter such as president, treasurer, etc., though in a broader sense the term includes vice presidents, general manager and other officials of the corporation." BLACK'S LAW DICTIONARY at 340 (6th ed. 1990). A store manager is not a "general manager" of a corporation, nor would he likely be considered an "official" of the corporation. Applying such a test to these Respondents was a prejudicial error.

Even if the store managers did have the same liabilities as corporate officers, the evidence as alleged suggests that they *did* personally commit, participate in, direct, or authorize the commission of a violation of the SCUTPA. The district court disposed of this argument by making a "finding" that "the alleged violation, or unfair trade practice, was the *corporate decision* to discontinue selling the plaintiffs' products not the *physical removal* of the products from store shelves." App. 22a. The district court made this ruling on an apparent factual basis, looking beyond the pleadings and drawing pro-*defendant* inferences "[a]fter hearing from all of the parties," but offered no legal justification for its unilateral decision to limit the acts it would consider to merely the corporate decision. The Petitioners clearly alleged that the physical removal of the sauce from the shelves in each store was a separate unfair act. The Petitioners also offered evidence that at least eight store managers across the state had individually chosen not to follow their corporate decisions, demonstrating that they

had a functional role in the physical removal of the products at their stores. The Petitioners submit that the district court should have properly considered all of the acts alleged as potential violations of the SCUTPA, and in turn as potential bases for individual liability. The Fourth Circuit erred by failing to credit this error.

Nor is it dispositive that the district court found that the Petitioners joined the individual Respondents with the purpose of defeating diversity and thereby preventing removal. *See* App. 230-1. The law on fraudulent joinder does not prohibit strategic decisions as to the best or most appropriate venue for a case, so long as there is a possibility of liability as to the individual defendants. The Petitioners respectfully submit that in light of the managers' independent actions, such potential for liability existed and the district court's overruling of the Petitioners' motions for remand was erroneous. The Fourth Circuit failed to give *de novo* attention to this issue as well, and its ruling is also a prejudicial error to the Petitioners.

CONCLUSION

For all of the above reasons, Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

Dated: March 11, 2005

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UNPUBLISHED

[ENTERED: NOVEMBER 19, 2004]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1067

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

Versus

FOOD LION, LLC; BOBBY DALTON,

Defendants - Appellees.

No. 04-1068

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

versus

MIKE GRAYBEAL;
WINN DIXIE CHARLOTTE, INCORPORATED,

Defendants - Appellees.

No. 04-1069

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

versus

SAM'S CLUB, INCORPORATED,

Defendant - Appellee,

and

CHARLIE GURISCO,

Defendant.

No. 04-1070

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

versus

WAL-MART STORES, INCORPORATED,

Defendant - Appellee,

and

LARRY LOLLIS,

Defendant.

No. 04-1071

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

versus

HARRIS TEETER, INCORPORATED;
RANDY RASMUSSEN,

Defendants - Appellees.

Appeals from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Chief District Judge. (CA-03-2828-3-17; CA-03-2874-17-8; CA-03-2807-4-17; CA-03-2810-8-17; CA-03-3153-2-17)

Argued: September 30, 2004
Decided: November 19, 2004

Before WIDENER, NIEMEYER, and LUTTIG, Circuit Judges.

Affirmed by unpublished opinion. Judge Niemeyer wrote the opinion, in which Judge Widener and Judge Luttig joined.

ARGUED: Glen Winston La Force, Sr., Hilton Head Island, South Carolina, for Appellants. E. Raymond Moore, III, MURPHY & GRANTLAND, P.A., Columbia, South Carolina; Cheryl Anne Falvey, AKINS, GUMP, STRAUSS, HAUER & FELD, L.L.P., Washington, D.C., for Appellees. **ON BRIEF:** George H. McMaster, TOMPKINS & MCMASTER, Columbia, South Carolina, for Appellants. Paul D. Harrill, Jonathan M. Milling, MCNAIR LAW FIRM, P.A., Columbia, South Carolina, for Appellees Del Haiz, America, Inc., and Bobby Dalton; Donald A. Cockrill, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Greenville, South Carolina, for Appellees Winn-Dixie Stores, Inc., and Mike Graybeal; Jeffrey Parker Dunlaevy, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Greenville, South Carolina, Jacob John Modla, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Charlotte, North Carolina, for Appellees Harris Teeter, Inc., and Randy Rasmussen.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

NIEMEYER, Circuit Judge:

Maurice Bessinger and his business, Piggie Park Enterprises, Incorporated, which operates barbecue restaurants in South Carolina and manufactures barbecue sauce and related products, commenced nine separate actions in South Carolina state court against food chain retailers that had ceased purchasing and offering for sale plaintiffs' barbecue products. In several of the actions, plaintiffs also sued individual store managers who carried out their stores' orders and

removed plaintiffs' barbecue products from store shelves. Each of the complaints purported to allege a violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10 et seq., based on the contention that the defendants' discontinuation of carrying plaintiffs' products was an unfair trade practice.

The plaintiffs' complaints alleged that in July 2000, when the Confederate battle flag was lowered from the top of the South Carolina capitol building, Bessinger began flying the Confederate battle flag at his restaurants. Within a month, an article appeared in The State newspaper that was extremely critical of Bessinger for flying the flag and for distributing religious literature at Bessinger's restaurants that the newspaper alleged to be controversial in nature. Following The State newspaper article, a series of news media stories appeared both in print and on radio and television "concerning [the media's] perception of Plaintiff Bessinger's political and religious views with special emphasis on the Confederate Battle Flag controversy." Following this publicity, defendants removed plaintiffs' products from store shelves and discontinued selling their products. As the complaints alleged, "[t]he sole reason that Plaintiffs' products were removed by the Defendants in this case was because of Plaintiff's individual political and religious views as expressed by him and publicized in the media." The plaintiffs claim that the defendants' retaliation against plaintiffs for their exercise of free speech was an unfair trade practice that violated SCUTPA. The plaintiffs

demanded in the aggregate $45 million in compensatory damages, as well as treble damages, punitive damages, and attorneys fees.

In the five actions against Food Lion, Inc., Winn-Dixie, Inc., Sam's Club, Inc., Wal-Mart Stores, Inc., and Harris Teeter, Inc., respectively, the defendants removed the cases to federal court based on diversity jurisdiction conferred by 28 U.S.C. § 1332 and filed motions to dismiss the complaints under Federal Rule of Civil Procedure 12 (b) (6). In the Food Lion, Winn-Dixie, and Harris Teeter cases, the plaintiffs in turn moved to remand the cases to state court because the store managers, who were also named defendants, were South Carolina citizens, thus destroying diversity of citizenship, the essential condition for diversity jurisdiction. The district court denied the motions to remand and granted the defendants' motions to dismiss under Rule 12 (b) (6).

Applying the "fraudulent joinder doctrine," see Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999); Marshall v. Manville Sales Corp., 6 F.3d 229, 232-33 (4th Cir. 1993), the district court disregarded the citizenship of the store managers because there was no possibility that the plaintiffs would be able to establish that the managers were liable under SCUTPA. The court observed that the managers "did not commit, participate in, direct or authorize the corporate decision to discontinue the plaintiffs' products." With the managers' citizenship disregarded, the court concluded that it had jurisdiction under 28 U.S.C. § 1332 and accordingly denied the plaintiffs' motion to remand.

On the question of whether the plaintiffs' complaints stated a claim under SCUTPA upon which relief could be granted, the district court concluded (1) that the plaintiffs' allegations that the defendants discontinued selling plaintiffs' products in retaliation against plaintiffs' speech did not allege an "unfair act," as required by SCUTPA, and (2) that the defendants' alleged retaliation did not adversely affect members of the public, also as required by SCUTPA. The district court reasoned that while the plaintiffs retained the right to speak out as they had done, the defendants retained the right to exercise their freedom not to sell plaintiffs' products. In addition, the court concluded that the exercise of these rights by the respective parties did not adversely affect the public but rather benefited it. As the court explained,

> the vendor is free to express his views; the store is free not to do business with the vendor based on those views; and the customer is free not to patronize the store because it no longer sells the vendor's product. Such free market interaction benefits rather than harms the public interest.

Accordingly, the district court entered judgment in favor of the defendants in each of the five actions on November 24, 2003. From these judgments, the plaintiffs appealed.

We have carefully reviewed the record and considered the arguments of the parties' counsel in their briefs and oral arguments, and at bottom, we

agree with the district court. Accordingly, for the reasons given by the district court in its opinion filed in each of the five actions, see Bessinger et al. v. Food Lion, LLC et al., No. 03-CV-2828 (D.S.C. Nov. 20, 2003); Bessinger et al. v. Winn Dixie, Inc. et al., No. 03-CV-2874 (D.S.C. Nov. 20, 2 0 03); Bessinger et al. v. Sam's Club, Inc. et al., No. 03-CV-2 8 07 (D.S.C. Nov. 20, 2 0 03); Bessinger et al. v. Wal-Mart Stores, Inc. et al. , No. 03-CV-2 810 (D.S.C. Nov. 20, 2 0 03); and Bessinger et al. v. Harris Teeter, Inc. et al. , No. 03-CV-3153 (D.S.C. Nov. 20, 2003), we affirm.

AFFIRMED

JUDGMENT
FILED: November 19, 2004

[ENTERED: NOVEMBER 19, 2004]

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 04-1067
CA-03-2828-3-17

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED

Plaintiffs - Appellants

v.

FOOD LION, LLC; BOBBY DALTON

Defendants - Appellees

NO. 04-1068
CA-03-2874-17-8

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED

Plaintiffs - Appellants

v.

MIKE GRAYBEAL;
WINN DIXIE CHARLOTTE, INCORPORATED

Defendants - Appellees

NO. 04-1069
CA-03-2807-4-17

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED

Plaintiffs - Appellants

v.

SAM'S CLUB, INCORPORATED

Defendant - Appellee

and

CHARLIE GURISCO

Defendant

NO. 04-1070
CA-03-2810-8-17

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED

Plaintiffs - Appellants

v.

WAL-MART STORES, INCORPORATED

Defendant - Appellee

and

LARRY LOLLIS

Defendant

NO. 04-1071
CA-03-3153-2-17

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED

Plaintiffs - Appellants

v.

HARRIS TEETER, INCORPORATED;
RANDY RASMUSSEN

Defendants - Appellees

Appeal from the United States District Court for the District of South Carolina at Columbia

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

FILED NOVEMBER 20, 2003

[ENTERED: NOVEMBER 21, 2003]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ORDER

Maurice Bessinger and Piggie Park Enterprises, Inc.,

Plaintiffs,

v. C/A No. 3:03-2828-17

Food Lion, Inc. and Bobby Dalton,

Defendants.

Maurice Bessinger and Piggie Park Enterprises, Inc.,

Plaintiffs,

v. C/A No. 8:03-2874-17

Winn-Dixie, Inc. and Mike Graybeal,

Defendants.

Maurice Bessinger and Piggie Park Enterprises, Inc.,

Plaintiffs,

v. C/A No. 4:03-2807-17

Sam's Club, Inc.,

Defendants.

Maurice Bessinger and Piggie Park Enterprises, Inc.,

Plaintiffs,

v. C/A No. 8:03-2810-17

Wal-Mart Stores, Inc.,

Defendants.

These four cases come before the court on (1) the motion by the plaintiffs to remand two of the cases removed to this court, and (2) the motion by the defendants in all four cases to dismiss the plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. After reading the briefs and hearing from all of the parties at a proceeding conducted at the University of South Carolina School of Law on October 20, 2003, the court orally denied the plaintiffs' motions to remand and granted the defendants' motions to dismiss. The court now issues its written order setting forth the reasons for having so ruled.

FACTS

The plaintiffs, Maurice Bessinger ("Bessinger") and his South Carolina Corporation, Piggie Park Enterprises, Inc. ("Piggie Park"), has been described by some as South Carolina's version of the Horatio Alger story. Bessinger built his now-famous barbeque business from the ground up, relying on hard work and a good product. The first of what would become a chain of eleven barbeque restaurants opened in Charleston, South Carolina in 195 3. Eventually, a large packaging and bottling plant was built to process barbeque sauce and meat for sale in stores. For many years, Bessinger sold his products to the defendants' stores: they, in turn, supplied South Carolinians and citizens of surrounding states with tasty mustard-based barbeque sauce. In September of the year 2000, the defendants discontinued selling the plaintiffs' products.

The plaintiffs allege the defendants discontinued the products in retaliation against Mr. Bessinger's exercise of his free speech rights. When the confederate flag was removed from the South Carolina state capitol in July 2000, Bessinger responded by flying the flag at

each of his eleven barbeque restaurants.[1] In August 2000, an article in *The State* newspaper highlighted Bessinger's controversial political and religious views, focusing chiefly upon his support for the confederate flag. The article was followed by a series of print, radio, and television news stories also focusing on Bessinger's support of the confederate flag. In September 2000, the defendants Winn-Dixie, Inc. ("Winn-Dixie"), Food Lion, Inc. ("Food Lion"), Sam's Club, Inc. ("Sam's Club"), and Wal-Mart Stores, Inc. ("Wal-Mart") discontinued selling the plaintiffs' products.

The plaintiffs' sole cause of action against all defendants is a state law claim for violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* ("SCUTPA") (Cumm. Supp. 2002). The first such SCUTPA complaint filed by the plaintiffs then removed to this court was captioned *Maurice Bessinger and Piggie Park Enterprises, Inc.* v. *Harris Teeter, Inc. and Jeff Lewis,* C/A No. 0:03-02728-17. In that case, the plaintiffs filed their complaint in the Sixteenth

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[1] The confederate flag began flying over the South Carolina statehouse dome in the early 1960s. Confederate flag supporters contend that the flag was placed above the statehouse to help commemorate the centennial of the Civil War. Flag opponents suggest that it was put there for a different purpose - To symbolize South Carolina's resistance to pending civil rights legislation. Suffice it to say that the flag has been a source of continuing controversy in South Carolina that has grown more intense over the years. In the decade of the 1990s, several groups organized economic boycotts of the State in an effort to have the flag lowered from the statehouse dome. Eventually, a compromise of sorts was agreed upon and the flag was removed from the statehouse dome and placed on a flag pole near the confederate soldier monument on the statehouse grounds.

Judicial Circuit of York County, South Carolina on August 1, 2003. On August 20, 2003, the defendants removed the case to federal court based on diversity jurisdiction, 28 U.S.C. § 1332.[2] The plaintiffs alleged in their complaint that the co-defendant, store manager Jeff Lewis ("Lewis"), was a citizen of South Carolina. However, attached to the notice of removal was an affidavit and a copy of Lewis's driver's license attesting to the fact that he was a citizen of North Carolina. On August 27, 2003, the plaintiffs filed a stipulation of voluntary dismissal and the case was closed. On August 28, 2003, the plaintiffs filed a new lawsuit against Harris Teeter in the Ninth Judicial Circuit of Charleston County, South Carolina. This time, the plaintiffs joined store manager and South Carolina resident Randy Rasmussen as a co-defendant. The action was removed to this court on October 3, 2003, but it is not before the court at this time. *Maurice Bessinger and Piggie Park Enterprises, Inc. v. Harris Teeter, Inc. and Randy Rasmussen,* C/A No. 2:03-3152-17.[3]

The four cases now before the court include: *Maurice Bessinger and Piggie Park Enterprises, Inc. v. FoodLion, Inc. and store manager Bobby Dalton,* C/A No. 3:03-2828-17; *Maurice Bessinger and Piggie Park Enterprises, Inc.* v. *Winn-Dixie, Inc. and store manager Mike Graybeal,* C/A No. 8:03-2874-17; *Maurice Bessinger*

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[2] The plaintiffs are citizens of the State of South Carolina. The defendant, Harris Teeter, Inc. ("Harris Teeter") is a citizen of the State of North Carolina.

[3] This case is not before the court at this time because the time for briefing the issues raised by the parties has not yet expired.

and Piggie Park Enterprises, Inc. v. *Sam's Club, Inc.*, C/A No. 4:03-2807-17;[4] *Maurice Bessinger and Piggie Park Enterprises, Inc. v. Wal-Mart Stores, Inc.*, C/A No. 8:03-2810-17.[5] The plaintiffs originally filed the lawsuits in state court, and the defendants removed them to federal court.[6]

The court will first resolve the jurisdictional questions of remand and fraudulent joinder before addressing the motions for dismissal.

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[4] The plaintiffs originally also named Sam's Club store manager, Charlie Gurisco, as a co-defendant. However, with the plaintiffs' consent, Gurisco was dismissed from the action on October 2,2003. Once the claims against Gurisco were dismissed, no in-state defendant remained to defeat diversity jurisdiction in this cause of action.

[5] The plaintiffs originally also named Wal-Mart store manager, Larry Lollis, as a co-defendant. Also, with the plaintiffs's consent, Lollis was dismissed from the action on October 2, 2003. Once the claims against Lollis were dismissed, no in-state defendant remained to defeat diversity jurisdiction in this cause of action.

[6] All the defendants based removal upon diversity jurisdiction, 28 U.S.C. § 1332. Food Lion argues that this court also has federal question jurisdiction under 28 U.S.C. § 1331 to hear the claims against it.

DISCUSSION

I. Motions to Remand for Lack of Subject Matter Jurisdiction

A. Removal and Fraudulent Joinder

Removal is technically effective upon the defendants' filing of their notice of removal, 28 U.S.C. § 1446. However, when a state law claim is before the federal court solely on the basis of diversity pursuant to 28 U.S.C. § 1332, the defendants' ability to keep that cause of action in the federal forum is restricted. The "complete diversity" rule limits diversity jurisdiction to only those cases where no shared citizenship exists between the adverse parties. *Strawbridge* v. *Curtiss,* 7 U.S. (3 Cranch) 267 (1806). If a party not diverse to the plaintiff has been joined as a defendant prior to the removal, the complete diversity rule is not satisfied and the district court is typically deprived of subject matter jurisdiction to hear the case. *Mayes* v. *Rapoport,* 198 F.3d 457, 461 (4th Cir. 1999). Without subject matter jurisdiction, the district court must remand the case to state court. 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.")

The judicially-created "fraudulent joinder doctrine" is an exception to the complete diversity rule that "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants at the time the case is removed." *Id.* at 461. In the Fourth Circuit, the

removing party has a heavy burden of showing fraudulent joinder. All issues of law and fact must be resolved in the plaintiffs favor and the plaintiff will prevail even where "only the possibility of a right to relief is asserted. *Marshall* v. *Manville Sales Corp.*, 6 F.3d 229, 232-33 (4th Cir. 1993). To be successful, the removing party must show "either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiffs pleading of jurisdictional facts." *Id.* at 232 (quoting *B., Inc.* v. *Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981) (emphasis in original)). Once the defendants raise a colorable claim of fraudulent joinder, the court may look beyond the pleadings to determine whether the nondiverse party has indeed been fraudulently joined. *Auto Ins. Agency, Inc.* v. *Interstate Agency, Inc.*, 525 F. Supp. 1104,1106 (D.S.C. 1981).

B. SCUTPA Claims Against Nondiverse Store Managers

Food Lion and Winn-Dixie contend the plaintiffs fraudulently joined nondiverse store managers Bobby Dalton and Mike Graybeal in their respective causes of action for the sole purpose of defeating federal subject matter jurisdiction. No defendant claims the plaintiffs committed outright fraud in pleading jurisdictional facts. Consequently, to prevail, Food Lion and Winn-Dixie must show that, under South Carolina law, the

plaintiffs have no possibility of recovery against the store managers for alleged SCUTPA violations.[7]

Section 39-5-20(a) sets forth conduct that gives rise to liability under the SCUTPA:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

S.C. Code Ann. § 39-5-20(a) (Cumm. Supp. 2002). Section 39-5-140 of the SCUTPA provides a private right of action for actual damages arising from violations of Section 39-5-20:

> Any person[8] who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages . . . .

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[7] "When hearing a case pursuant to diversity jurisdiction, a federal court must determine issues of state law as it believes the highest court in the state would determine them." *Bettis & Sanderson, P. C.* v. *Nat 7 Fire Ins.*, 839 F.2d 1009, 1019 (4th Cir. 1988) (quoting Wright & Miller, et al., FED. PRACTICE & PROCEDURE § 4509 (1982)).

[8] Person under the SCUTPA includes "natural persons, corporations, trusts, partnerships, incorporated or unincorporated association and any other legal entity." S.C. CODE ANN. § 39-5-10(a) (Cumm. Supp. 2002).

S.C. Code Ann. § 39-5-140(a) (Cumm. Supp. 2002).

To maintain a private cause of action under SCUTPA, a plaintiff must establish: (1) the defendant engaged in an unlawful trade practice; (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice; and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998) (citing S.C. Code Ann. § 39-5-140; *Daisy Outdoor Advertising Co.* v. *Abbott*, 473 S.E.2d 47, 49 (S.C. 1996)).

The South Carolina Supreme Court has declared "[t]he plain language of section 39-5-140 provides that any person is liable for damages resulting from their *use or employment* of unfair trade practices." *Plowman v. Bagnal*, 450 S.E.2d 36,37 (S.C. 1994) (emphasis in original). While no South Carolina case squarely addresses whether a grocery store manager may be held liable for the unfair trade practices of his or her employing corporation, the South Carolina Supreme Court has ruled on the liability of "control persons" under the SCUTPA. The court in *Plowman* v. *Bagnal* rejected derivative liability for control persons "for all corporate violations of section 39-5-140 without regard to whether that person 'used or employed' an unfair trade practice." *Id.* The court reasoned: "It is well-settled that corporate officers and directors are not liable for the tortious conduct of the corporation unless they commit, participate in, direct, or authorize the commission of a tort." *Id.* (citation omitted). The court thus held "in private actions under the UTPA, directors

and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA." *Id.* at 38.

In the cases before the court, the plaintiffs allege that the defendants' decisions to stop selling the plaintiffs' products in retaliation against Mr. Bessinger's controversial speech constituted an unfair trade practice. The plaintiffs further allege that the store managers "participated in" that unfair trade practice by physically removing Bessinger's products from their stores' shelves. The defendants argue that the store managers in no way participated in, directed or authorized the act alleged to be the unfair trade practice — *i.e.,* the *corporate decision* to discontinue selling the plaintiffs' products. The defendants contend, correctly, that if SCUTPA liability were imposed on store managers for merely following corporate orders, then liability could also be imposed on the stock boy who carried out the store manager's order. To be personally liable for the SCUTPA violations of the corporation, however, the store managers must have committed, participated in, directed or authorized the *commission of the violation.*

After hearing from all of the parties, the court finds that the alleged violation, or unfair trade practice, was the *corporate decision* to discontinue selling the plaintiffs' products not the *physical removal* of the products from store shelves. In that regard, even if the corporate defendants committed a SCUTPA violation, the plaintiffs still have no possibility of a right to relief against the store managers. The managers did not

commit, participate in, direct or authorize the *corporate decision* to discontinue the plaintiffs' products.

In further support of their fraudulent joinder argument, the defendants note that the plaintiffs failed to join as co-defendants the control persons who actually made the corporate decision to discontinue the products. These control persons, unlike the store managers, may be held personally liable for the unfair trade practices of their corporation under South Carolina law. The defendants argue that the plaintiffs' failure to join control persons indicates that the store managers were joined solely for the purpose of defeating diversity jurisdiction. Joining out-of-state control persons would not destroy diversity: joining in-state store managers would.

Other circumstantial evidence supports the defendants' claims that the store managers were fraudulently joined. The first lawsuit removed to this court was voluntarily dismissed once it was determined that the local store manager joined as a co-defendant was in fact diverse to the plaintiffs, thereby conferring diversity jurisdiction upon this court. Approximately one day after voluntarily dismissing that case, the plaintiffs filed another lawsuit in state court against the same corporate defendant. This time, however, the plaintiffs named a different store manager as co-defendant — a citizen of South Carolina. Additionally, the plaintiffs voluntarily dismissed the store managers joined as co-defendants in their causes of action against Sam's Club and Wal-Mart. The circumstances of these dismissals indicated that no in-state co-defendant could be located to defeat diversity

jurisdiction. Finally, the plaintiffs' decision to join nondiverse store managers (who have no decision-making power) coupled with their decision not to join diverse control persons (who made the decision complained of) indicates that defeating this court's jurisdiction was the sole reason for joining the instate store managers.

For all of these reasons, the court finds the defendants have met their heavy burden of establishing fraudulent joinder. Under South Carolina law, the plaintiffs have not even the slightest possibility of recovery against the co-defendant store managers for SCUTPA violations; thus, the claims against Bobby Dalton and Mike Graybeal are dismissed. Having dismissed these claims, the complete diversity requirement is satisfied with respect to the plaintiffs' causes of action against Food Lion and Winn-Dixie. The court therefore denies the plaintiffs' motions to remand these cases to state court. Finding federal subject matter jurisdiction proper in all four pending cases, the court will next address the defendants' motions to dismiss.[9]

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[9] Because the court finds it has subject matter jurisdiction on the basis of diversity, it does not reach the question of whether it also has federal question jurisdiction as asserted by Food Lion.

II. Motions to Dismiss for Failure to State a Claim under Rule 12(b)(6)

A. Standard of Review

A motion to dismiss should be granted only when it appears that the plaintiff can prove no set of facts in support of a claim that would entitle the plaintiff to relief on that claim. *Conley v. Gibson,* 355 U.S. 41,45-46 (1957). In considering a motion to dismiss, the court must view the complaint in the light most favorable to the plaintiff and resolve every doubt in the plaintiffs favor. The plaintiffs allegations are to be taken as true for the purpose of ruling upon the motion. *Jenkins* v. *McKeithen,* 395 U.S. 411,421-22 (1969). In addition, any inference reasonably drawn from the complaint must be considered together with the plaintiffs allegations of fact. *Murray v. City of Milford,* 380 F.2d 468, 470 (2d Cir. 1967). However, the court may not consider conclusions of law or unwarranted deductions of fact. *Mylan Laboratories, Inc.* v. *Akzo, N. V.,* 770 F. Supp. 1053,1059 (D.Md. 1991). It is also well-settled that a complaint cannot be amended by the plaintiffs briefs in opposition to a motion to dismiss. *Id.* at 1068.

B. Failure to State a Claim Under the SCUTPA

A claim for money damages under the SCUTPA is an action at law. *Payne* v. *Holiday Towers, Inc.,* 321 S.E.2d 179, 182 (S.C. Ct. App. 1984). And, for purposes of this motion, the facts pled by the plaintiff must be taken as true. Consequently, the court must base its ruling upon the presumption that the defendants

discontinued selling the plaintiffs' products in retaliation against Mr. Bessinger's publicly expressed views regarding the confederate flag.

To defeat the defendants' motions to dismiss, the plaintiffs must establish that the act complained of constituted an unfair trade practice as contemplated by the SCUTPA. Moreover, the plaintiff must establish that the unfair or deceptive practice or act adversely impacts the public interest. *Jeffries* v. *Phillips,* 451 S.E.2d 21,23 (S.C. Ct. App. 1994) (citations omitted). Under South Carolina law, unfair or deceptive acts have an adverse impact upon the if those acts have the potential for repetition. *Haley Nursey Co.* v. *Forrest,* 381 S.E.2d 906, 908 (S.C. 1989); *Global Protection Corp. v. Halbersberg,* 503 S.E.2d 483, 487 (S.C. Ct. App. 1998) (citing *York* v. *Conway Food, Inc.,* 480 S.E.2d 726, 728 (S.C. 1997)). However, conduct that affects only the parties to the transaction and not the public interest provides no basis for a SCUTPA claim. *Jeffries,* 451 S.E.2d at 23. Because only unfair acts that adversely affect the public interest give rise to liability under the SCUTPA, a deliberate or intentional breach of contract, without more, does not constitute a violation of the SCUTPA. *Wilson Group, Inc.* v. *Quorum Health Res., Inc.,* 880 F. Supp. 416, 426 (D.S.C. 1995) *(citing Ardis v. Cox,* 431 S.E.2d 267,271 (S.C. Ct. App. 1993)); *see also S.C. Nat'lBank v. Silks,* 367 S.E.2d 421, 423 (S.C. Ct. App. 1988) (reiterating that mere breach of contract does not give rise to SCUTPA liability).

1. Unfair or Deceptive Act or Practice

This court has already determined that the act complained of is the corporate decision to discontinue selling the plaintiffs' products. Therefore, to state a claim under the SCUTPA, the plaintiffs must show that corporate decision constitutes either an unfair or deceptive act or practice. *See* S.C. Code Ann. § 39-5-140(a) (Cumm. Supp. 2002).[10] The plaintiffs do not allege any "deceptive practice" on the part of the defendants. Thus, the plaintiffs must demonstrate the decision to discontinue selling the products in retaliation against Mr. Bessinger's speech was an "unfair act."

The SCUTPA does not expressly define "unfair act." The General Assembly of South Carolina, however, has expressly stated:

> It is the intent of the legislature that in construing paragraph (a) of this section the court will be *guided* by the interpretations given by the Federal Trade Commission and the Federal

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10 Section 39-5-140(a) of the SCUTPA provides:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages . . . .

S.C. CODE ANN. § 39-5-140 (Cumm. Supp. 2002).

> Courts to § 5(a)(l) of the Federal Trade Commission Act (15 U.S.C. 45(a)(l)) ["FTCA"], as from time to time amended.

S.C. Code Ann. § 39-5-20(b) (Cumm. Supp. 2002) (emphasis added). The federal courts' construction of section 5(a)(l) of the FTCA may guide, therefore, this court's determination of the meaning of "unfair act" under the SCUTPA. *Bostick Oil Co.* v. *Michelin Tire Corp. Comm 'IDiv.*, 702 F.2d 1207, 1220 (4th Cir. 1983).

When construing section 5(a)(l) of the FTCA, most federal courts have applied the definition of'unfair" set forth in *Spiegel, Inc. v. F.T.C,* 540 F.2d 287 (7th Cir. 1976). A practice is unfair within the meaning of the Federal Trade Commission Act when it "offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id.* at 293.[11]

Applying the Seventh Circuit's definition of "unfair" to the cases at hand, if termination of a business relationship on the facts alleged here offends established public policy and constitutes an "immoral,

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[11] *See, e.g., Am. Fin. Serv. Ass'n* v. *FTC,* 767 F.2d 957, 983 (D.C. Cir. 1985); *Betts* v. *Advance Am.,* 213 F.R.D. 466, 482 (M.D. Fla. 2003); *Rogers* v. *Cisco Sys., Inc.,* 268 F. Supp. 2d 1305, 1317 n.21 (N.D. Fla. 2002); *Samuels* v. *Old Kent Bank,* 1997 WL 45 8434 (N.D. 111. 1997), at *9; *Moore* v. *Lomas Mtg. USA,* 796 F. Supp. 300, 306 (N.D. 111. 1992); *Miraffi, Inc.* v. *Murphy,* 928 F.2d 410 (Table) (W.D.N.C. Feb. 4,1991); *Gen'l United Co.* v. *Am. Honda Motor Co.,* 618 F. Supp. 1452, 1455 (C.D.N.C. 1985); *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.,* 491 F. Supp. 1199 (D. Haw. 1980) (applying or referencing the definition of "unfair" found in *Spiegel).*

unethical, oppressive, unscrupulous" act, the SCUTPA would have substantially contravened long-established basic contract principles. It is still good law in South Carolina that:

> The fundamental conception of a contract is that it is an agreement, and that implies mutual consent. Therefore, the law allows one to determine for himself with whom he will contract; hence one may refuse to contract with another or to buy or sell his goods without incurring liability for the resulting damage, even though his refusal be prompted by the intent to injure the other . . . . All authorities agree the right to refuse to enter into business relations with another is an absolute right.

McMaster v. *Ford Motor Co.*, 115 S.E. 244, 246-47 (S.C. 1921) (internal citation omitted). If the plaintiffs can force the defendants to continue in a business relationship, removing from them the freedom to terminate it, then the mutuality that has long defined business agreements has vanished. The SCUTPA was enacted to protect the public: "The [A]ct is not available to redress a private wrong where the public interest is unaffected." *Columbia E. Assoc.* v. *Bi-Lo, Inc.*, 386 S.E.2d

259,263 (S.C. Ct. App. 1989) (re-stating a deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the SCUTPA).[12]

The plaintiffs correctly state that Mr. Bessinger's speech, however controversial, is protected under the First Amendment to the United States Constitution. U.S. CONST, amend. I. The very purpose of the First Amendment is to protect speech that is unpopular or controversial. *C.f., Nat 7 Soc. White People's Party* v. *Ringers,* 473 F.2d 1010, 1015 (4th Cir. 1973) ("There is no dispute that the First Amendment protects from *state* interference the expression in a public place of the unpopular as well as the popular ") (emphasis added). While Mr. Bessinger has exercised his right to express his views, the defendants have likewise exercised their freedom not to sell his products. *See Meyer* v. *Nebraska,* 292 U.S. 390, 399 (1923) (broadly stating liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract..."); *c.f., Integrated Consulting Serv., Inc. v. LDDS,* 176 F.3d 475 (Table), at *9 (4th Cir. Apr. 15, 1999) ("freedom *not* to

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12 "The legislature's intent [was] to limit the application of the UTPA to only those unfair or deceptive acts or practices in the conduct of trade or commerce that affect the public interest...." *Noack Enterprises, Inc.* v. *Country Corner Interiors of Hilton Head Island, Inc.,* 351 S.E.2d 347, 349 (S.C. Ct. App. 1986). The language of the statute "reflects the legislature's intent that an unfair or deceptive act or practice in the conduct of any trade or commerce injuriously affect 'the people of this State,'i\e., the public interests, before it can be actionable under the UTPA." *Id.* Consequently, while an injured private party may not have a cause of action under the SCUTPA, he is not without recourse. Contract and tort causes of action provide the primary mechanisms for redressing grievances between private parties.

contract should be as protected as freedom to contract") (emphasis in original).

When viewing all of the law and all of the facts in the light most favorable to the plaintiffs, the court cannot find that the defendants' decisions to discontinue selling the plaintiffs' products either offends established public policy or was "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." If it were, every breach of contract action would give rise to SCUTPA liability. Yet, South Carolina law is clear: even an intentional breach of contract, absent an adverse public impact, will not support a cause of action under the SCUTPA. *Columbia E. Assoc,* 386 S.E.2d at 263.

The Fourth Circuit has indicated, *in dicta,* that wrongful termination of a distributorship may sustain a SCUTPA claim. *Chuck's Feed & Seed Co.* v. *Ralston Purina Co.,* 810 F.2d 1289,1292 (4th Cir. 1987) (citing *Bostick Oil Co. v. Michelin Tire Corp.,* 702 F.2d 1207,1220 (4th Cir. 1983) ("This court has suggested, in *dicta,* that the UTPA may also extend to conduct which would give rise to a cause of action for wrongful termination under South Carolina common law.")). However, the Fourth Circuit has also found that termination of a distributorship was not actionable under the SCUTPA where the termination was a business decision, was not wrongful, and had no adverse impact on the public. *Richland Wholesale Liquors v. Glenmore Distilleries Co.,* 818 F.2d 312, 317(4th Cir. 1987). In the time since the Fourth Circuit cases indicating that wrongful termination *may* give rise to SCUTPA liability, the South Carolina courts have expressly held that: "a

deliberate or intentional breach of contract, without more, does not constitute a violation of the Unfair Trade Practices Act." *Columbia E. Assoc. v. Bi-Lo, Inc.*, 386 S.E.2d 259, 263 (S.C. Ct. App. 1989) (citing *Key Co. v. Fameco Distributors, Inc.*, 357 S.E.2d 476, 478 (S.C. Ct. App. 1987); and conduct that affects only parties to the transaction provides no basis for a SCUTPA claim, *Jeffries v. Phillips*, 451 S.E.2d 21, 23 (S.C. Ct. App. 1994).

Yet, giving the plaintiffs every benefit of the law, assuming *arguendo* that discontinuing the plaintiffs' products in retaliation for his unpopular speech was an "unfair act" within the meaning of the SCUTPA, the plaintiffs must also demonstrate that this unfair act adversely impacted the public interest. *Florence Paper Co.* v. *Orphan*, 379 S.E.2d 289,291 (S.C. 1989); *LaMotte* v. *Punch Line of Columbia, Inc.*, 370 S.E.2d 711, 713 (S.C. 1988); *Noack Enterprises, Inc.* v. *Country Corner Interiors of Hilton Head Island, Inc.*, 351 S.E.2d 347, 349-50 (S.C. Ct. App. 1986).

2. *Adverse Public Impact*

To sustain a cause of action under the SCUTPA, the plaintiffs must establish, by specific facts, that members of the public were adversely affected by the defendants' retaliation against Mr. Bessinger's speech. *See Jeffries* v. *Phillips*, 451 S.E.2d 21, 23 (S.C. Ct. App. 1994) (quoting *Daisy Outdoor Advertising Co. v. Abbott*, 451 S.E.2d 394, 397(S.C. Ct. App. 1994), "[w]ithout proof of specific facts disclosing that members of the public were adversely affected by the unfair conduct or that they were likely to be, all we are left with is a 'speculative claim of adverse public impact' and that

will not suffice under the UTPA."). "An unfair or deceptive trade practice has an impact upon the public interest if it has the potential for repetition." *York v. Conway Foods,* 480 S.E.2d 726,728 (S.C. 1997); *Haley Nursey Co.* v. *Forrest,* 381 S.E.2d 906, 908 (S.C. 1989); *Global Protection Corp.* v. *Halbersberg,* 503 S.E.2d 483,487 (S.C. Ct. App. 1998). However, a deliberate or intentional breach of contract, without more, will not sustain a claim under the SCUTPA. *Ardis* v. *Cox.,* 431 S.E.2d 267, 271 (S.C. Ct. App. 1993). "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the [A]ct's embrace...." *Noack Enterprises, Inc.* v. *Country Corner Interiors of Hilton Head Island, Inc.,* 351 S.E.2d 347, 349-50 (S.C. Ct. App. 1986). "Otherwise every intentional breach of contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages." *Ardis,* 431 S.E.2d at 271.

The plaintiffs allege the defendants' retaliation against Mr. Bessinger's speech impacts the public interest because it has the potential for repetition. The potential for repetition here, the plaintiffs argue, is that the defendants may similarly retaliate against other vendors who express controversial views. While that may be true, the court is hard pressed to find how members of the public are adversely impacted in that respect. The defendants sell the vendor's products to make money. If the defendants retaliate against vendors by refusing to sell their products, they risk disenfranchising some customers even while attempting to preserve their relationship with others. The market, therefore, typically drives the business

decision about which products to carry and which products not to carry. Customers can express their disapproval of a store's decision not to sell a product by shopping elsewhere.

In other words, the vendor is free to express his views; the store is free not to do business with the vendor based on those views; and the customer is free not to patronize the store because it no longer sells the vendor's product. Such free market interaction benefits rather than harms the public interest. How can this court force the grocery store to sell the vendor's product when it cannot, and will not, force the customers to patronize the store? The business decision should, and does, rest squarely with the one who bears the risk of the decision. *See Smithy Braedon Co.* v. *Hadid,* 825 F.2d 787,790 (4th Cir. 1987) (quoting Justice Holmes regarding freedom of contract: "I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear."); *Richland Wholesale Liquors* v. *Glenmore Distilleries, Co.,* 818 F.2d 312, 317 (4th Cir. 1987) (noting that "it is not for the courts or juries to second-guess" certain business decisions); *c.f, Glaesner v. Beck/Arnley Corp.,* 790 F.2d 384, 390 (4th Cir. 1986) (noting that "South Carolina law has never equated the exercise of

reasonable business judgment with an act of tortious bad faith .").[13]

The court finds, in the cases before it, the only harm suffered from the alleged unfair act was purely private. Having failed to demonstrate that the act complained of adversely impacted the public interest, no remedy is available under the SCUTPA to redress the plaintiffs' grievances.

CONCLUSION

For the reasons stated above, the court has resolved the jurisdictional questions of remand and fraudulent joinder in the Food Lion and Winn-Dixie cases as follows: (1) the court finds the in-state store managers Bobby Dalton and Mike Graybeal were fraudulently joined and, thus, dismisses the plaintiffs' claims against them; (2) having dismissed the plaintiffs' claims against the in-state co-defendants, the court finds the complete diversity requirement of 28 U.S.C. §

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13 In *Glaesner*, the plaintiff sued for wrongful termination of a written distributorship agreement in violation of South Carolina tort law and the SCUTPA. Because the Fourth Circuit found that the termination was not wrongful, the court did not address whether wrongful termination alone would give rise to liability under SCUTPA. The court did, however, explain: "Ordinarily, violations of SCUTPA are either antitrust or consumer actions. Here we note no antitrust allegations, no allegations of anticompetitive conduct, and no allegations of consumer injury." *Glaesner v.Beck/Arnely Corp.*, 790 F.2d 384, 390 (4th Cir. 1986) (internal citations omitted). Similarly, in the cases before this court, the plaintiffs make no antitrust allegations, no allegations of anticompetitive conduct, and no allegations of *consumer* injury.

1332 satisfied; and (3) because the court has federal subject matter jurisdiction to hear these cases, the court denies the plaintiffs' motions to remand the Food Lion and Winn-Dixie causes of action to state court.

With respect to the defendants' motions to dismiss pursuant to Fed. R. Civ. P 12(b)(6), the plaintiffs cannot sustain their SCUTPA claims against the defendants. The plaintiffs have failed to establish that the corporate decision by the defendants to discontinue selling the plaintiffs' products constitutes an unfair act that adversely impacts the public interest. The defendants' motions to dismiss the plaintiffs' unfair trade practices claims are hereby granted.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

November 20, 2003
Columbia, South Carolina

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: DECEMBER 14, 2004]

No. 04-1067
CA-03-2828-3-17

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

v.

FOOD LION, LLC; BOBBY DALTON,

Defendants - Appellees.

No. 04-1068
CA-03-2874-17-8

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

v.

MIKE GRAYBEAL;
WINN DIXIE CHARLOTTE, INCORPORATED,

Defendants - Appellees.

No. 04-1069
CA-03-2807-4-17

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

v.

SAM'S CLUB, INCORPORATED,

Defendant - Appellee,

and

CHARLIE GURISCO,

Defendant.

No. 04-1070
CA-03-2810-8-17

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

v.

WAL-MART STORES, INCORPORATED,

Defendant - Appellee,

and

LARRY LOLLIS,

Defendant.

No. 04-1071
CA-03-3153-2-17

MAURICE BESSINGER;
PIGGIE PARK ENTERPRISES, INCORPORATED,

Plaintiffs - Appellants,

v.

HARRIS TEETER, INCORPORATED;
RANDY RASMUSSEN,

Defendants - Appellees.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court of the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered at the direction of Judge Widener, with the concurrence of Judge Niemeyer and Judge Luttig.

For the Court,

/s/ Patricia S. Connor
CLERK